

[Title 14 Department of Fish and Game]

**NOTICE BY THE DEPARTMENT OF FISH AND GAME
TO CONSIDER THE ADOPTION OF REGULATIONS
TO AMEND DIVISION 1, SUBDIVISION 3, CHAPTER 6,
TITLE 14, CALIFORNIA CODE OF REGULATIONS,
ADDING ARTICLE 3, SECTIONS 787.0 et seq.**

[Notice Published May 11, 2007]

NOTICE IS HEREBY GIVEN that the Department of Fish and Game (DFG) proposes to amend its regulations for Implementation of the California Endangered Species Act by adding regulations implementing Fish and Game Commission policies to guide the DFG's issuance of incidental take permits for lawful timber operations and activities that may result in the take of coho salmon.

PROPOSED REGULATORY ACTION

The DFG proposes to amend Division 1, Subdivision 3, Chapter 6, title 14, California Code of Regulations, by adding the following:

Article 3, sections 787.0 *et seq.*, Incidental Take Permit Guidelines for Timber Operations.

This regulatory action is related to a concurrent Board of Forestry and Fire Protection (Board) regulatory action that is being noticed separately by the Board. The Board proposes to amend the Forest Practice Rules under a rulemaking proposal entitled Coho Salmon Incidental Take Assistance, 2007.

PUBLIC HEARING

The DFG will conduct two public hearings on the proposed action. The hearings will be held:

Friday, June 22, 2007, starting at 10:00 a.m., at the Resources Building Auditorium, 1st Floor, and 1416 Ninth Street, Sacramento, California. This hearing will provide the public an opportunity to provide comments during the written comment period described below. No DFG action will be taken at this hearing. This hearing will be held jointly with a Board hearing on the Board's related regulatory proposal, Coho Salmon Incidental Take Assistance, 2007.

Thursday, July 12, 2007, starting at 8:00 a.m., at the Inter-Mountain Fair of Shasta County, 44218 A St. McArthur, CA, 96056. This hearing will provide the public an opportunity to provide comments following the close of the written comment period described below. This hearing will be held jointly with a Board hearing on the Board's related regulatory proposal, Coho Salmon Take Assistance, 2007. The Board may take regulatory action at this hearing to adopt its proposed regulations. DFG does not intend to take any action to adopt these proposed regulations at this hearing. Instead, DFG may take action subsequent to the hearing.

WRITTEN COMMENT PERIOD

Any interested person may submit written comments relevant to DFG's proposed action. Written comments must be received by DFG no later than 5:00 p.m. **Monday, June 25, 2007**, in order to be considered. Written comments may be delivered, mailed, or transmitted by facsimile or electronic mail. Written comments should be addressed as follows:

To: Mark Stopher, Habitat Conservation Program Manager
California Department of Fish and Game
601 Locust Street
Redding, CA 96001
Fax: (530) 225-2391
Email: mstopher@dfg.ca.gov

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The purpose of the proposed action is to adopt rules and guidelines in accordance with Section 2112 of the Fish and Game Code to implement Fish and Game Commission policies regarding the issuance of incidental take permits pursuant to Section 2081 of the Fish and Game Code for timber operations or activities that may take coho salmon, a species that is listed as threatened or endangered under the California Endangered Species Act, Fish and Game Code sections 2050, et seq. (CESA). The Fish and Game Commission approved the *Recovery Strategy for California Coho Salmon (*Oncorhynchus kisutch*)* (February 2004), and approved for inclusion specified policies pursuant to Section 2112 of the Fish and Game Code to guide the issuance of incidental take permits under Section 2081 of the Fish and Game Code for timber operations or activities. This article implements those policies.

In accordance with section 2112 of the Fish and Game Code, this article specifies conditions and circumstances when: (1) take is prohibited;

(2) an incidental take permit is required; and (3) an incidental take permit is not required. This article outlines various ways to obtain incidental take permits for timber operations and activities, including an expedited process for obtaining incidental take permits by certification pursuant to these regulations, and through the normal permitting process set forth in CESA implementing regulations, California Code of Regulations, title 14, section 783.0 *et seq.*

The standards for issuance of incidental take permits are the permit issuance criteria set forth in section 2081(b) and (c) of the Fish and Game Code. This article is not intended to create a presumption that any particular timber operation or activity will incidentally take coho salmon. In addition, it does not affect the DFG's authority to authorize take pursuant to any other provision of the Fish and Game Code or any other provision of the California Code of Regulations including, but not limited to, take authorizations issued or approved by the DFG pursuant to section 2835 of the Fish and Game Code.

The proposed action is related to a separate regulatory proposal of the Board entitled Coho Salmon Incidental Take Assistance, 2007. The regulations that the DFG proposes are procedural regulations that in part rely upon the Board's proposed regulations that are the subject of a separate Initial Statement of Reasons. The proposed Board regulations set forth certain definitions and substantive measures in the Forest Practice Rules (FPRs) that enable the DFG to establish certain incidental take permitting procedures that meet the permit issuance criteria under CESA (Fish and Game Code § 2081, subdivisions (b) and (c)) for incidental take permits, including a certification process for providing incidental take permits under CESA for timber operations and activities that may result in take of coho salmon.

Currently, no regulatory procedure for the issuance of incidental take permits for coho salmon is integrated with the FPRs. Without such an integrated approach, in addition to applying to the Department of Forestry and Fire Protection for approval of timber harvesting plans, timberland owners would have to engage in a lengthy, separate process for obtaining incidental take permits for coho salmon from the DFG for any timber operations or activities that would result in take of the species. This would involve separate environmental review processes and related costs to both the permit applicant and the DFG.

DISCLOSURES REGARDING THE PROPOSED ACTION

The DFG has made the following initial determinations concerning the proposed action:

(a) Duplication of Federal Law

The DFG's proposed regulations do not duplicate existing federal law or regulations.

(b) Environmental Analysis

The DFG has determined on the basis of an Initial Study for this proposed action and the Board's proposed action that this proposed action will not result in significant environmental effects. The Board is the lead agency under the California Environmental Quality Act (Pub. Resources Code, § 21000, *et seq.*)(CEQA). The DFG is a responsible agency under CEQA. As such, in accordance with CEQA Guidelines section 15253, DFG intends to use the Board's substitute environmental analysis document pursuant to its Certified Regulatory Program.

(c) Financial Impacts and Impacts on Business

The proposed regulatory action to establish rules and guidelines regarding the issuance of incidental take permits for coho salmon for timber operations and activities that may result in the take of coho salmon are procedural and would not directly affect businesses, including the ability of California businesses to compete with businesses in other states, except perhaps to the extent that they provide an expedited certification process for obtaining incidental take permits from DFG. The certification process would authorize the take of coho salmon, a listed species under CESA. The proposed regulations establishing the certification process require compliance with specified substantive regulations of the Board that together would minimize and fully mitigate impacts of the timber harvesting activities on coho salmon and meet other permit issuance criteria required by CESA under Fish and Game Code section 2081(b) and (c). Therefore, to the extent businesses are engaged in activities that will take coho salmon and choose to obtain incidental take permits through the certification process, the proposed regulatory action may result in adverse economic impacts directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

Where the DFG authorizes take of coho salmon that is incidental to an otherwise lawful activity, impacts of the taking must be minimized and fully mitigated, and any such mitigation must be monitored for implementation and effectiveness under CESA. Permitting under CESA for

incidental take of coho salmon would result in some increased costs when compared to the status quo under the current FPRs, which includes the federal take prohibition under the ESA. The DFG has determined that the costs to timber operators statewide are estimated to be \$183,000/year or \$5.49 million over 30 years. This is explained in greater detail in the Initial Statement of Reasons.

However, if the streamlined permitting process established by the proposed regulations is used, it would result in savings of additional costs to permit applicants in obtaining incidental take permits through the standard process set forth in Section 2081(b) of the Fish and Game Code and the associated environmental review under CEQA.

DFG has made an initial determination that the adoption of this regulation may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The types of businesses that would be affected include those businesses engaged in activities that may take coho salmon and choose to obtain incidental take permits through the certification process. This would involve complying with additional rules being proposed by the Board (14 CCR § 916.9.2 [936.9.2] , § 923.9.2 [943.9.2] , and 916.11.1[936.11.]) that are intended to provide enhancements to the FPRs to meet the requirements under CESA for minimization and full mitigation where the optional expedited procedural process of obtaining an incidental take permit is used.

DFG has considered proposed alternatives that would lessen any adverse economic impact on business, and invites the submission of proposals. Submissions may include the following considerations:

- (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.
- (ii) Consolidation or simplification of compliance and reporting requirements for businesses.
- (iii) The use of performance standards rather than prescriptive standards.
- (iv) Exemption or partial exemption from the regulatory requirements for businesses.

(d) Mandates on Local Agencies and School Districts

The proposed action will not impose any mandates on local agencies or school districts.

(e) Cost to Any Local Agency or School District for Which Reimbursement is Required

Adoption of the proposed regulations will not result in costs to any local agency or school district that are required to be reimbursed pursuant to Part 7 (commencing with section 17500) of Division 4 of the Government Code, other nondiscretionary cost or savings on local agencies, or any cost or savings in federal funding to the State.

(f) Cost or Savings to Any State Agency

Adoption of the proposed regulations may result in savings to DFG in that if the streamlined permitting process is used, it will save DFG staff resources in issuing incidental take permits.

(g) Significant Adverse Economic Impact on Businesses

Adoption of the proposed regulations may result in adverse economic impacts as described in (c) above and in the Initial Statement of Reasons.

(h) Statement of Potential Cost Impact on Private Persons and Businesses

Adoption of the proposed regulations may result in potential costs impacts on private persons and businesses as described in (c) above and in the Initial Statement of Reasons.

(i) Effect on Housing Costs

Adoption of the proposed regulations will not have any effect on housing costs.

(j) Assessment of Potential to Create or Eliminate Jobs or Businesses or Expand Business within the State of California

Adoption of the proposed regulations may result in the creation of jobs as described in the Initial Statement of Reasons. The adoption of the proposed regulations are unlikely to lead to an expansion of business in the State.

(k) Effect on Small Businesses

Adoption of the proposed regulations may result in effects on small businesses as described in (c) above and in the Initial Statement of Reasons.

CONSIDERATION OF ALTERNATIVES

In accordance with subsection 11346.5(a)(13) of the Government Code, the DFG must determine that no reasonable alternative considered by DFG or that has otherwise been identified and brought to the attention of DFG would be as effective and less burdensome to affected private persons than adoption of the proposed regulations. The DFG has made this determination, and the explanation is contained in the Initial Statement of Reasons.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The DFG has prepared an Initial Statement of Reasons providing an explanation of the purpose, background, and justification for the adoption of the proposed regulations and the DFG's Form Std. 399. Anyone may view and print a copy of the statement or text of the proposed regulations by accessing the following page on the DFG's Internet website: www.dfg.ca.gov. Copies of the Initial Statement of Reasons and the text of the proposed regulations are also available upon request from the DFG's contact person, Mark Stopher, at (530) 225-2275. The entire rulemaking file is available for public inspection at 1416 Ninth Street, Suite 1335, Sacramento, California 95814.

The DFG will post the Final Statement of Reasons and any future notices related to the proposed action on the DFG's Internet website: www.dfg.ca.gov. Anyone wishing to receive future notices related to the proposed action and/or receive a copy of the Final Statement of Reasons once it has been prepared should submit a written request containing the requestor's postal mailing address to Mark Stopher, Habitat Conservation Program Manager, 601 Locust Street, Redding, California 96001. These requests can also be submitted by fax at (530) 225-2391.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

The text of any changes or modifications to the text of the proposed regulation will be available to the public at least fifteen (15) days prior to the date on which the DFG considers the proposed regulations for adoption unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that

the public was adequately placed on notice that the change could result from the originally proposed regulatory action. (Gov. Code, § 11346.8(c).) This information will also be made available on the DFG Internet website at: www.dfg.ca.gov.

PLAIN ENGLISH DETERMINATION AND AVAILABILITY OF TEXT

The proposed regulations were prepared pursuant to the standard of clarity provided in Government Code section 11349 and the plain English requirements of Government Code sections 11342.580 and 11346.2(a)(1). The proposed regulations are considered non-technical and were written to be easily understood by the persons that will use them. The purpose of the proposed regulations is to provide rules and guidelines in accordance with Section 2112 of the Fish and Game Code to implement Fish and Game Commission policies regarding the issuance of incidental take permits pursuant to Section 2081 of the Fish and Game Code for timber operations or activities that may take coho salmon. These rules and guidelines will be used by persons in government as well as the private sector.

The text of the proposed regulations is in plain English and is available on the DFG Internet website at: www.dfg.ca.gov and upon request from the DFG's contact person, Mark Stopher, at (530) 225-2275.

A copy of the express terms of the proposed action using UNDERLINE to indicate an addition to the California Code of Regulations and ~~STRIKETHROUGH~~ to indicate a deletion, is also available from the contact person named in this notice.

AUTHORITY

The authority for the DFG to adopt these proposed regulations is provided in Fish and Game Code sections 702 and 2112.

Reference: Section 2081, Fish and Game Code.

Dated: May 1, 2007

original signed by
John McCamman, CDD, for
L. Ryan Broddrick, Director
Department of Fish and Game